

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SHANE JONES,

Plaintiff,

V.

MIKE DAVIS, and FRED DOUGLAS,

## Defendants.

CASE NO. C09-5186FDB

ORDER DIRECTING PLAINTIFF  
TO SUBMIT AN AMENDED  
COMPLAINT OR SHOW CAUSE  
WHY MATTER SHOULD NOT  
BE SUMMARILY DISMISSED

The Court, having reviewed plaintiff's application for IFP, complaint and the balance of the record contained herein, does hereby find and ORDER the following:

(l) A complaint is frivolous when it has no arguable basis in law or fact. Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an in forma pauperis complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing* Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)).

Here, Plaintiff's Complaint states:

On October 8, 2008, I was arrested do to a warrant that the Gig Harbor police obtained regarding a criminal act that took place on Borgen Blvd. Gig Harbor. A warrant was obtained with illigitament facts for the arrest, therefore I have been unlawfully imprisoned in the pierce county jail. I believe that I am owed monies

1 for lost wages, along with payment for every day that I have been illegally  
2 imprisoned, which will be determined upon release after my trial.

3 Complaint at 3.

4 (2) Plaintiff's complaint appears to call into question the validity of his continued  
5 confinement in prison. More specifically, Plaintiff is seeking immediate release, as well as  
6 money damages, in the amount of \$25,000 per day beyond his earned release date ("ERD").

7 In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully  
8 exhausted available state remedies has no cause of action under § 1983 unless and until the  
9 conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of  
10 habeas corpus." Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994). The court added:

12 Under our analysis the statute of limitations poses no difficulty while the  
13 state challenges are being pursued, since the § 1983 claim has not yet arisen. . . .  
14 [A] § 1983 cause of action for damages attributable to an unconstitutional  
conviction or sentence does not accrue until the conviction or sentence has been  
invalidated.

15 Id. at 2374.

16 It appears Plaintiff's claims necessarily call into question the legality of his current  
17 confinement in the Pierce County Jail. Based on the above alleged facts, Plaintiff's claims  
18 should be first raised in a petition for writ of habeas corpus, not a § 1983 civil rights claim for  
19 money damages. Significantly, Plaintiff has not shown that he has previously successfully  
20 challenged the decision to keep him in custody and that that decision violates his constitutional  
21 rights in the context of his conviction and sentence. Thus, it appears a § 1983 claim for  
22 monetary damages is premature.

23 (3) Plaintiff has failed to describe how each defendant was personally involved in the  
24 alleged deprivations. In order to state a claim under 42 U.S.C. § 1983, a complaint must allege  
25 facts showing how individually named defendants caused or personally participated in causing

1 the harm alleged in the complaint. Arnold v. IBM, 637 F.2d 1350, 1355 (9th Cir. 1981).  
2 Plaintiff's complaint does not show that any of the individuals named as defendants personally  
3 participated in the alleged civil rights violations. Plaintiff should also noted that a defendant  
4 cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or  
5 position. Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58 (1978). A  
6 theory of respondeat superior is not sufficient to state a § 1983 claim. Padway v. Palches, 665  
7 F.2d 965 (9th Cir. 1982).

9 (4) Due to the deficiencies described above, Plaintiff shall file an amended complaint,  
10 curing, if possible, the above noted deficiencies, or show cause why this matter should not be  
11 dismissed by no later than **May 14, 2009**. If an amended complaint is not timely filed or if  
12 plaintiff fails to adequately respond, the Court will recommend dismissal of this action as  
13 frivolous pursuant to 28 U.S.C. § 1915, and such dismissal will count as a "strike" under 28  
14 U.S.C. § 1915(g).

16 (5) The Clerk is directed to send Plaintiff a copy of this Order and the General Order  
17 DATED this 15<sup>th</sup> day of April, 2009.

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20 J. Richard Creatura  
21 United States Magistrate Judge  
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